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IN THE

Supreme Court of the United States

October Term, 1964

No. 1106

DAVID RATKE and MONROE CAINE,

Petitioners,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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6 Moore's Fed. Practice, page 58 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

DAVID RATKE and MONROE CAINE,

Petitioners,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 26, 1964, denying appellants' motion for reconsideration of the order entered on March 9, 1965, dismissing petitioners' appeal to the Court of Appeals.

Citations to Opinions Below

Petitioners were convicted after a jury trial on an eleven count indictment alleging violations of 18 U. S. C. 1341 and 18 U. S. C. 2, and were fined and sentenced to prison terms.

The Court of Appeals reversed the judgments of conviction and ordered a new trial in an opinion printed in Appendix A, *infra*, page 12, officially reported at 316 F. 2d 225. The Court of Appeals failed to rule on various substantive issues of law which, had they been determined in favor of petitioners, would have dismissed the indictment and made a new trial unnecessary. Accordingly, petitioners moved the District Court to dismiss the indictment on the same grounds presented to, but not ruled upon by, the Court of Appeals.

The opinion of the District Court is printed in Appendix A, *infra*, at page 14, and is not yet officially reported.

Petitioners then moved for leave to file an interlocutory appeal, and in the alternative, to clarify the opinion and mandate previously issued by the Court of Appeals. The opinion of the Court of Appeals granting petitioners' motion is printed in Appendix A, *infra*, page 19, and is not officially reported.

The Court of Appeals thereafter dismissed the appeal on the ground that permission to take the appeal had been improvidently granted, by order dated March 9, 1965 which is reprinted in Appendix A, *infra*, page 20, and which is not yet officially reported.

Petitioners moved for reconsideration of the order of the Court of Appeals entered on March 9, 1965, dismissing the appeal and said motion was denied in an order dated March 26, 1965, which is printed in Appendix A, *infra*, page 21, and which is not yet officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the Court of Appeals erred in refusing to entertain an appeal to hear and determine substantive questions of law presented, but not ruled upon by the Court of Appeals, on a prior appeal from judgments of conviction.

Statute Involved

The statutory provision involved is 28 U. S. C. 1651, the All-Writs Statute, printed in Appendix B, *infra*, page 22.

Facts

On November 10, 1959, petitioners were indicted on eleven counts for alleged violations of 18 U. S. C. 1341 and 18 U. S. C. 2.

Two jury trials of this case were had. The first trial was commenced on May 23, 1960 and a mistrial was ordered after six days of testimony. On June 6, 1961, the case proceeded to trial for the second time and at the conclusion of the Prosecutor's case, the Trial Judge directed a judgment of acquittal with respect to two other defendants, Louis Wolf and Abraham Wolf, who had been indicted with the petitioners, but denied similar relief as to the petitioners. After a trial which lasted six weeks and consumed 4,000 pages of transcript, the petitioners were convicted on all counts and petitioner Ratke was sentenced to eighteen months in prison and fined $3,000.00, and the petitioner Caine was sentenced to one year in prison and fined $2,000.00.

Petitioners thereafter appealed to the Court of Appeals for the Sixth Circuit urging fifteen different grounds for reversal, five of which, if sustained, would have required a dismissal of the indictment, and ten of which if sustained, would have required a reversal of the judgments of conviction and a new trial.

The Court of Appeals reversed the judgments of conviction and ordered a new trial in an opinion reported at 316 F. 2d 225. The Court of Appeals did not discuss nor rule upon the legal questions submitted by petitioners which would have required a dismissal of the indictment and made a third trial unnecessary. These were:

1. That the indictment was insufficient as a matter of law under the doctrine of *Parr* v. *U. S.*, 336 U. S. 370.*

2. That the petitioners were immune from prosecution under 15 U. S. C. 49 by reason of their testimony under subpoena before the Federal Trade Commission;

3. That the petitioners were required to be acquitted as a matter of law under the authority of *Harrison* v. *U. S.*, 200 Fed. 662; and

4. That the petitioners could not be guilty as aiders and abettors where the two Wolf defendants whom they had allegedly aided and abetted had been acquitted on a directed judgment of acquittal by the Trial Judge.

After the mandate of the Court of Appeals issued, a substantial question existed as to whether the Court of Appeals had in fact considered the legal questions which petitioners had presented as grounds for dismissal of the

* It was subsequently submitted that the indictment was also insufficient under the authority of *U. S.* v. *Simmons*, 96 U. S. 360.

indictment. In order to clarify this question, it was decided that these points of law should be presented to the District Judge, accompanied by a request that if the District Court ruled adversely to petitioners, it grant leave to file a proceeding with the Court of Appeals to clarify that Court's previously issued opinion and mandate, or alternatively, to allow an interlocutory appeal from the District Court's ruling.

Petitioners thereupon filed a motion with the District Court to dismiss the indictment on the above mentioned grounds.

At the argument of petitioners' motion before the District Court, the District Judge as well as the United States Attorney, stated on the record that justice required that the issues presented to the District Court, which had previously been presented to the Court of Appeals but not ruled upon, be determined by the Court of Appeals before petitioners were tried for the third time. In this connection, the District Judge and the United States Attorney stated as follows:

> "The Court: I might state this, although this is probably not the time for me to say it, but on the matter of the interlocutory appeal, regardless of how the Court may determine—or if the Court should hold against the defendants, *it would seem to me that justice would require that an interlocutory appeal be granted. It would be for several reasons: First of all, this does involve questions of law, as to which are controlling, and as to which there is, in the judgment of the Court, substantial ground for a difference of opinion.*
>
> "Secondly, *because of the time already consumed at the trial, it would seem to me that justice would*

require that these issues be determined by the Circuit Court of Appeals before we proceed to trial.

"So, insofar as the trial set for January 21st is concerned, it seems to me that if the Court would rule against the defendants in this case, an interlocutory appeal should be permitted, unless I hear to the contrary from you, Mr. Merrill (Government counsel).

"Mr. Merrill: No." (Emphasis added.)

On February 6, 1964, the District Judge issued an opinion and order denying petitioners' motion to dismiss the indictment, which opinion and order are printed in Appendix A, *infra*, page 14.

Petitioners thereupon filed a motion in the Court of Appeals for leave to file an interlocutory appeal, or in the alternative, to clarify the prior mandate and opinion issued by the Court of Appeals, pursuant to 28 U. S. C. 1651.

On April 3, 1964, the Court of Appeals entered an order granting petitioners' motion stating that "upon due consideration thereof * * * it appear(s) to the Court that said motion should be granted."

Accordingly, and pursuant to permission granted by the Court of Appeals, petitioners perfected a second appeal to the Court of Appeals on the entire record on appeal in the first appeal, comprising a three volume appendix and other documents, together with a supplemental appendix which contained only one additional set of papers, to wit, the motion and supplemental motion before the District Court and the opinion and order of the District Court denying said motions. Petitioners submitted substantially the identical brief which had been submitted to the Court of Appeals on the first appeal, and the Government like-

wise submitted substantially the same brief which it had submitted on the first appeal.*

Shortly prior to the oral argument of the appeal, the Government apparently changed its mind and moved to dismiss the appeal on the ground that the order appealed from was not a final order of the District Court and that interlocutory appeals under 28 U. S. C. 1292(b) were limited to appeals in civil actions. The Court of Appeals heard argument on the said motion as well as on the merits of the appeal itself, and on March 9th entered an order dismissing the appeal, stating that "the appeal was improvidently granted". Petitioners then filed a motion for reconsideration of the order of the Court of Appeals entered on March 9, 1965 dismissing the appeal. The said motion was denied by an order of the Court of Appeals entered on March 26, 1965.

This petition thus presents the rather unique situation wherein petitioners, at substantial expense and travail, have perfected two appeals to the Court of Appeals, the first from the judgment of conviction pursuant to 28 U. S. C. 1291, and the second pursuant to leave granted by the Court of Appeals, but have not as yet been able to secure any ruling from the Court of Appeals with respect to the substantive questions heretofore raised subsequent to judgments of conviction.

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* In connection with the said second appeal, petitioners filed a motion for leave to dispense with the printing of briefs on the ground that petitioners, by reason of the costly proceeding which this case had taken to date, were without funds to perfect the appeal on printed papers. The said motion was granted by the Court of Appeals.

Reasons for Granting Writ

The instant case does not involve a situation wherein an interlocutory appeal was sought in the Court of Appeals, to review rulings by the District Court, in advance of trial as a substitute for a future appeal. The petitioners have already been tried and judgments of conviction were entered. Despite two appeals to the Court of Appeals, they are now compelled to stand trial for the third time without rulings which could be dispositive of this entire proceeding.

Petitioners respectfully submit that certiorari should be granted in the instant matter which involves the fair administration of criminal justice and this Court's judicial supervision with respect thereto. *McNabb* v. *United States*, 318 U. S. 332, 340.

The right of appeal in a criminal case is substantial and fundamental and should not be diluted or whittled away or made so expensive to pursue as in effect to constitute an abrogation of a defendant's right to appeal. Under our system of Anglo-Saxon jurisprudence, an accused's right to a fair trial, of necessity, includes a right of appeal, free from strained and tortuous adherence to procedural requirements which serve only to deny an accused the benefits of his appeal.

The Court of Appeals was clearly vested with power to rule upon the issues herein, under the authority conferred by 28 U. S. C. 1651, the All-Writs Statute, and should not have treated the second appeal as an interlocutory appeal in its technical sense.* *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 87 L. Ed. 1185, 63

* Indeed, when petitioners sought leave to appeal to the Court of Appeals, their motion was framed in the alternative, i.e., for leave to file an interlocutory appeal or for leave, under 28 U. S. C. 1651, to clarify the Court's opinion on the first appeal.

S. Ct. 938; *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309. See also: 6 *Moore's Fed. Practice*, page 58.

And so it has been held that the All-Writs Statute authorizes a Court of Appeals to review a nonappealable interlocutory order even to aid the Court of Appeals' *prospective* appellate jurisdiction and it is improper to postpone review until an appeal is taken from the final judgment. *McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 S. Ct. 501; *Barber Asphalt Paving Co.* v. *Morris*, 132 Fed. 945 (CA 8, 1904).

Indeed, it has even been held that if the order is nonappealable and the party nevertheless takes an improvident appeal, the improvident appeal may be treated as a petition for an appropriate writ. *Shapiro* v. *Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (CA 9, 1950); *Steccone* v. *Morse-Starrett Products Co.*, 191 F. 2d 197 (CA 9, 1951).

The facts of this case provide even more compelling cause to utilize the All-Writs Statute where a judgment of conviction was entered and an appeal taken raising the issues herein sought to be reviewed.

Instead of treating the appeal as a petition for an appropriate writ under 28 U. S. C. 1651, to clarify the mandate and opinion on the prior appeal to the Court of Appeals, the Court of Appeals has placed the case in a posture wherein the petitioners are now required to stand trial for the third time before appellate review can be obtained as to the validity of the indictment.

The issue herein is not solely one of inconvenience or expense that may result from a postponed review of petitioners' contentions. We are rather considering a substantive question of defendants' rights, where the defend-

ants have been subjected to two trials and two appeals over a period of six years and still have not been able to obtain rulings dispositive of the entire case. Petitioners are not seeking a short cut. Rather they are seeking to correct a manifestly unjust situation affecting basic rights of an accused.

Petitioners respectfully submit that the instant case presents extraordinary circumstances justifying the exercise by the Court of Appeals of its jurisdiction and power to treat the second appeal as a petition for an appropriate writ under 28 U. S. C. 1651. Surely, the label attached to the particular paper submitted to the Court of Appeals cannot be all important particularly where there is involved a defendant's fundamental right to an appeal in a criminal case. Petitioners respectfully submit that the fair and orderly administration of criminal justice requires that rulings be made by the Court of Appeals on questions of law twice submitted to that Court, before they are required to stand trial for a third time. Even from the Government's point of view, it would seem that the additional expense of another protracted trial should not be incurred without a ruling on these basic issues.

Petitioners respectfully submit that a writ of certiorari be issued to the Court of Appeals and that upon the granting of such writ, the Court of Appeals be directed to pass upon the questions of law presented to it on the second appeal. This Court is not being asked at this itme to review the merits of these questions of law. It is more appropriate to remand the case to the Court of Appeals so that it may pass on such questions in order to give the Supreme Court the benefit of the views of the Court of Appeals before an appeal on the merits is taken to the Supreme Court. *United States* v. *Ballard*, 322 U. S.

78, 88 L. Ed. 1148, 64 S. Ct. 882; *Tunstall* v. *Brotherhood of Locomotive Firemen and Engineers*, 323 U. S. 210, 89 L. Ed. 187, 65 S. Ct. 235.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and an order entered remanding the case to the Court of Appeals to pass upon the questions presented to it.

Respectfully submitted,

MILTON A. BASS,
SOLOMON H. FRIEND,
Counsel for Petitioners.

Dated: April 23, 1965.

APPENDIX A

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

April 16, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID RATKE and MONROE CAINE,
Defendants-Appellants.

No. 14993

PER CURIAM.

Defendants-Appellants, David Ratke and Monroe Caine, were convicted by a jury of violation of Title 18 U.S.C.A. §1341 (obtaining money by means of false pretenses, etc.). Their motions for direction of acquittal had been denied and, after verdict, their motions for judgment of acquittal notwithstanding the verdict and for a new trial were likewise denied. Judgments were entered upon the verdict. David Ratke was sentenced to prison for a term of one and a half years and fined a total sum of $3,000.00. Monroe Caine was sentenced to prison for one year and fined a total sum of $2,000.00.

Among other grounds asserted by appellants for reversal are their claims that there were errors in the Dis-

trict Judge's charge to the jury, and in his rulings on the admissibility of evidence. We agree.

Because the matters charged as giving rise to errors in the Court's charge, and in the rulings on evidence, are not likely to arise upon a retrial, we deem it unnecessary to review the background to such claimed errors. We are satisfied, however, that the issues were never clearly presented to the jury either by the evidence or by the instructions of the Court.

Appellants also attack the sufficiency of the evidence to support the jury's verdict, and ask that we order that a judgment of acquittal be entered. The record before us lacks the clarity needed for adequate consideration of this asserted ground for reversal. The remedy which we may grant upon a reversal, based upon insufficiency of the evidence is committed to our discretion. Title 28 U.S.C.A. §2106; Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335; Brandt v. United States, 256 F.2d 79 (CA 6, 1958); United States v. Dunn, 299 F.2d 548, 555 (CA 6, 1962). We, accordingly, do not pass on this question, but choose to grant a new trial.

Judgment reversed and a new trial ordered.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Docket No. 37827

UNITED STATES OF AMERICA,

Plaintiff

vs

DAVID RATKE and MONROE CAINE,

Defendants

OPINION AND ORDER DENYING MOTION TO DISMISS INDICTMENT.

Defendants move to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure, alleging:

1. That the indictment is void in that it does not charge a violation of the mail fraud statute (Title 18, USC 1341).

2. That the use of the mails alleged in the indictment is not an essential and integral part of the alleged scheme to defraud.

3. That the allegations of falsity in the indictment refer to an event to occur in the future and therefore do not constitute actionable fraud.

4. That the defendants are entitled to immunity from this prosecution by reason of their testimony under subpoena before the Federal Trade Commission under provisions of Sec. 9 of the Federal Trade Commission Act, T.15 USC. 49.

5. That the defendants are charged as aiders and abettors under T. 18 USC. Sec. 2, but cannot be guilty as such, as the defendants whom they are alleged to have aided and abetted, were acquitted on a directed judgment of acquittal.

6. That the money-back guarantee negates the specific intent to defraud required under T. 18 USC. Sec. 1341.

On the date of the hearing, an amended motion to dismiss was filed with one additional ground for dismissal, namely, that the indictment is fatally defective in that it does not allege the name of the person whom the defendants aided and abetted, or allege that his name is unknown.

This matter was fully tried previously and the conviction appealed to the Circuit Court of Appeals. On April 16th, 1963, that Court reversed the judgment of conviction and ordered a new trial because of "errors in the charge to the jury and in rulings on the admissibility of evidence" (316 F. 2d, 225).

The case was set for re-trial on January 21, 1964, and defendants after receipt of notice for trial filed the present motion on December 23rd, 1963.

It should be noted that all of the grounds alleged here, with the exception of the request for dismissal for failure to name the person allegedly aided and abetted, were presented to the Circuit Court of Appeals at the time of

the appeal after the defendants' conviction. The opinion and order of the Circuit Court of Appeals granting the new trial does not refer to any of these grounds and it is reasonable to assume that the arguments of counsel for defendants and appellants were not adopted by that Court, since it ordered a new trial for defendants and not a dismissal of the indictment, as would follow if the presently urged grounds were sustained. The defendants could have, of course, moved in the Circuit Court of Appeals for a rehearing in order to have determined the issues which they now raise again here, and thus avoid the necessity of a re-trial if that Court sustained their contentions. They have chosen not to avail themselves of that remedy and now seek a determination of these same issues by this Court.

Whether or not the defendants should have sought a rehearing, this Court is nevertheless of the opinion that the grounds urged by defendants have no merit.

With regard to the first three issues raised by the defendants, this Court is of the opinion that the indictment sufficiently alleges a violation of the mail fraud statutes. The case of *U. S. v. Sampson*, 371 U. S. 75, relied upon by the defendants, holds that there was no

> "automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme"

and that

> "subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes".

In the instant case, the alleged mailing of the money to the defendants by the secretarial service in Detroit was a necessary part of the scheme and was done for the purpose of executing the scheme, and since it is alleged that defendants caused the mailing, the indictment is valid. Neither is there any basis to the claim that the indictment is faulty in that the allegation of knowledge of the falsity of the representations refers to an act to occur in the future.

With regard to the claim of immunity by reason of defendants' testimony before the Federal Trade Commission, the Court notes that defendants were subpoenaed there on matters unrelated to those in the present indictment and made only passing and remote reference to matters here involved. The references were not incriminating and not used against defendants in this case. In *Hicke* v. *U. S.*, 227 U. S. 139, where defendants claimed immunity by reason of testimony before a Federal Grand Jury investigating matters unrelated to the indictment, the Court said:

> "The evidence given in the former proceeding did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it. * * * It neither led nor could have led to a discovery of his crime".

The fifth ground alleged by the defendants, namely, that acquittal of the persons whom they were alleged to abet, bars conviction of these defendants, cannot be sustained as they are charged in the indictment as principals.

In the sixth ground, defendants take the position that the money-back guarantee precludes their indictment in

view of the Government's stipulation that such guarantee was made and carried out. The stipulation does not concede that good faith was admitted. Whether or not the guarantee was made and carried out in good faith is an issue of fact which must be submitted to the jury for determination. The position of the defendants that the stipulation necessarily carries with it the conclusion that the guarantee was made and carried out in good faith is untenable.

Since, as stated above, the defendants are charged in the indictment as principals, there is no merit to the defendants' argument that the indictment is faulty in that it does not name those whom the defendants are alleged to have aided and abetted. It is obvious that at the retrial the issue would be the defendants' guilt or innocence as principals and not abettors.

For the foregoing reasons,

IT IS ORDERED

That the Motion to Dismiss the Indictment is Denied.

THADDEUS M. MACHROWICZ,
Thaddeus M. Machrowicz,
U. S. District Judge.

Dated at Detroit, Michigan
this 6th day of February, 1964

No.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs

David Ratke and Monroe Caine,
Defendants-Appellants.

Before Miller, Cecil and O'Sullivan, Circuit Judges.

Application has been made to this Court by the above defendants for leave to take an interlocutory appeal from an order entered by Honorable Thaddeus M. Machrowicz, U. S. District Judge for the Eastern District of Michigan, Southern Division, on February 6, 1964, denying the above named defendants' motion to dismiss the indictment in a cause pending in said court. Upon due consideration thereof, and it appearing to the Court that said motion should be granted,

Now, therefore, it is ordered that the application of the above named defendants to take an interlocutory appeal from the above mentioned order is hereby allowed.

Approved for entry.

Clifford O'Sullivan
U. S. Circuit Judge

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

Order No. 15,941

United States of America,
Plaintiff-Appellee,

AGAINST

David Ratke and Monroe Caine,
Defendants-Appellants.

Before: Miller, Phillips and Edwards, Circuit Judges.

The present interlocutory appeal is taken from an order of the District Judge denying apellants' motions to dismiss the indictment, following reversal by this Court of the judgment of conviction and a remand to the District Court for a new trial. *United States* v. *Ratke,* 316 F(2) 225. The appeal was applied for and taken under the provisions of Section 1292 (b), Title 28, United States Code.

Shortly prior to the oral argument on the appeal, the Government moved to dismiss the appeal on the ground that the order appealed from was not a final decision of the District Court. *Section 1291, Title 28, United States Code,* and that interlocutory appeals under Section 1292(b), Title 28, United States Code, are limited to appeals in civil actions.

The Court is of the opinion that the motion to dismiss is well taken and that the appeal was improvidently granted. *Catlin* v. *United States*, 324 U. S. 229, 236; *Chereton* v. *United States*, 256 F(2) 576, C. A. 6th; *Hoffa* v. *Gray*, 323 F(2) 178, C. A. 6th; *Snodgrass* v. *United States*, 326 F(2) 409, C. A. 8th.

It is ordered that the appeal herein be and is dismissed.

Entered by Order of Court:

Carl W. Reuss
Clerk

No. 15,941

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Order

United States of America,
Plaintiff-Appellee,

v.

David Ratke and Monroe Caine,
Defendants-Appellants.

Before: Miller, Phillips and Edwards, Circuit Judges.

Appellants' motion for reconsideration of the order of the Court entered herein on March 9, 1965, dismissing this appeal, having been considered by the Court:

It is ordered that said motion be and is denied.

Entered by Order of Court:

Carl W. Reuss
Clerk

APPENDIX B

28 USC 1651 provides:

Writs.—(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1106

DAVID RATKE AND MONROE CAINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, p. 20) has not yet been reported. A previous opinion is reported at 316 F. 2d 225.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1965. A petition for rehearing was denied on March 26, 1965. The petition for a writ of certiorari was filed on April 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After the court of appeals reversed a conviction and remanded for a new trial, the district court de-

773-166—65

nied a motion to dismiss the indictment on various grounds which had been briefed on the prior appeal but not discussed in the opinion of that court. The question presented is whether the court of appeals erred in refusing to rule specifically on these questions after the decision of the district court before retrial of petitioners.

STATEMENT

In 1961, petitioners were convicted in the United States District Court for the Eastern District of Michigan of use of the mails in a scheme to defraud the public in the sale of a product for automobiles (known as the Turbo-Jet Converter) advertised as a method of saving gasoline. On appeal, petitioners contended that the indictment failed to allege an offense in that the mailings were not in furtherance of the scheme; that they had obtained immunity from prosecution because of testimony before the Federal Trade Commission; that acquittal of two co-defendants necessarily required that they be acquitted; that the evidence was insufficient to support the conviction; and that there were errors in the judge's charge to the jury and in his rulings on the admissibility of evidence. The court of appeals held that there were errors in the charge and rulings on evidence. As to the sufficiency of the evidence it ruled that the record before it lacked the clarity needed for adequate consideration of this asserted ground for reversal, and stated that it did not pass on this question but chose to grant a new trial. 316 F. 2d 225. It did not discuss the other arguments advanced—contentions

which, if accepted, would have required dismissal of the indictment.

After the case was remanded to the district court and set for trial in January 1964, petitioners filed a motion to dismiss the indictment, again contending, *inter alia*, that the indictment did not state an offense; that they were immune from prosecution; and that the acquittal of their co-defendants required that they be acquitted as well. The district court denied the motion on February 6, 1964. In its opinion, the district court noted that most of the grounds urged had been presented to the court of appeals on the appeal from the original conviction, and that the grant of a new trial indicated that petitioners' arguments had not been adopted by that court. It nevertheless considered each of the issues raised and found them to be without merit (Pet. App. 14–18).

Petitioners sought to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b) and leave to do so was originally granted by the court of appeals (Pet. App. 19). However, on the government's motion, the court of appeals dismissed the appeal, holding that the order appealed from was not a final decision of the district court and that interlocutory appeals under 28 U.S.C. 1292(b) are limited to appeals in civil actions (Pet. App. 20–21).

ARGUMENT

It is of course clear beyond dispute that the denial of a motion to dismiss an indictment is not an appealable order. This case differs from the ordinary case in which such a motion is made and denied in only

one respect: the same contentions advanced in the motion had been previously advanced and argued before the court of appeals on a prior appeal, although they were not discussed by that court in its opinion. If petitioners' case is distinguishable from other attempts to secure review of interlocutory orders entered in criminal cases, it would have to be on the theory that this Court may properly direct the court of appeals to grant what amounts to an untimely petition for rehearing. We know of no precedent for such a suggestion. Moreover, we question the premise implicit in petitioners' claim that this case calls for extraordinary measures—the assumption that the court of appeals did not consider the contentions made before it on the initial appeal. That court's failure to discuss those contentions in its opinion does not warrant the inference that they were not considered. Rather, the court of appeals' determination that the matter should be remanded for a new trial may fairly be said to reflect a conclusion that the indictment stated an offense and called for trial. It is accordingly submitted that the case should proceed in ordinary course and that the petition seeking review of the interlocutory order of the district court should be denied.

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Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The brief of the United States in opposition ignores petitioners' basic contention, namely, that it would be a gross injustice to require petitioners to stand trial for the third time before appellate review can be obtained of contentions presented to, but not ruled upon by, the Court of Appeals on two prior appeals. Instead, the Government argues that this petition should be denied on highly technical grounds which do not take into account at all petitioners' substantive rights.

Quite apart from the obviously inequitable character of the Government's position, the Government's arguments do not stand up under analysis.

1. The Government suggests that the failure of the Court of Appeals to discuss petitioners' contentions and its direction of a new trial warrants the inference that the Court of Appeals had rejected plaintiffs' contentions and concluded that the indictment stated an offense. The short answer is that the Court of Appeals had at least two occasions to advise petitioners that it had considered and rejected petitioners' contentions, but failed to do so. Instead, the Court granted leave to file an appeal for the express purpose of considering these contentions. Its subsequent dismissal of the appeal was not on the ground that these contentions had already been considered, but rather on the sole ground that the Court of Appeals thought it lacked power to rule upon these questions at this stage of the proceedings, even though the same contentions had previously been raised on a prior appeal from judgments of conviction.

2. Petitioners are not asking this Court to direct the Court of Appeals to grant an untimely petition for rehearing. This is not the issue at all. Rather, it appears that the Court of Appeals had revoked its permission to file the second appeal upon the erroneous belief that it lacked power to entertain a second appeal taken to review contentions previously raised, but not ruled upon, which would have been dispositive of the entire case. Regardless of whether the second appeal be considered an "interlocutory appeal", a "petition for rehearing", or a proceeding by any other name, the Court of Appeals clearly possesses power to entertain the proceeding under the All-Writs Statute, 28 U. S. C. 1651. There can be no question and in-

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[1] Indeed, the Court of Appeals had even allowed petitioners' counsel to argue the merits of the contentions on the scheduled hearing of the second appeal, pending the Court's determination as to its power to entertain such appeal.

deed, the Government does not contend otherwise—that 28 U. S. C. 1651 vests the Court of Appeals with power to issue all writs necessary or appropriate in aid of its jurisdiction, and that Section 1651 constitutes ample authority for the Court of Appeals to have entertained the second appeal to avoid an obvious and substantial injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 17, 1965